

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON**

THE ESTATE OF CINDY LOU HILL, by  
and through its personal representative,  
Joseph A. Grube; and CYNTHIA  
METSKER,  
individually,

Plaintiffs,

vs.

NAPHCARE INC., an Alabama  
corporation; HANNAH GUBITZ,  
individually; and SPOKANE COUNTY, a  
political subdivision of the State of  
Washington.

Defendants.

**NO. 2:20-cv-00410-RMP**

**SPOKANE COUNTY'S  
SUPPLEMENTAL BRIEFING RE  
PLAINTIFFS' MOTION FOR  
DEFAULT JUDGMENT**

**I. INTRODUCTION**

The Court provided an opportunity for the parties to submit supplemental briefing regarding plaintiffs' motion for default judgment on two issues: 1) Can the Court enter a default judgment against Spokane County when the County is contesting its liability in a pending summary judgment motion?; and 2) If the Court determines that a sanction under

1 Fed. R. Civ. P. 37 (e)(2) is warranted, should the Court consider the impact of any sanction  
2 against Spokane County on co-defendant NaphCare?<sup>1</sup> Dkt. Entry 49.

## 3 II. RELEVANT FACTS

4 On August 21, 2018, Ms. Cindy Lou Hill was arrested and booked into the Spokane  
5 County Jail. Dkt. 1, pg. 7-8. She was placed on an opioid withdrawal protocol because she  
6 informed Jail medical (NaphCare personnel) that she was an active heroin user. *Id.* On  
7 August 25, 2018, in the morning, Ms. Hill was moved to cell 2W-17, in a different section of the  
8 Jail at the request of a NaphCare nurse. *Id.*, pg. 11. Ms. Hill was found unresponsive in her cell  
9 at approximately 5:24 p.m. on August 25, 2018. *Id.*, pg. 13. Efforts to revive her were  
10 unsuccessful and she was later pronounced dead at Sacred Heart Medical Center. *Id.*, pg. 14;  
11 Dkt. 33., ex. 1, pg. 3.

12 The Spokane County Sheriff's Office investigated Ms. Hill's death, both at the Hospital  
13 and at the Jail. *Id.* This included interviewing all Jail Corrections officers who had contact  
14 with Ms. Hill prior to her death, other inmates, an inspection of her cell and Jail records, and a  
15 review of the available video surveillance. *Id.*, pp. 12-16.

16 The Spokane County Medical Examiner's Office performed an autopsy. *Id.*, pp. 26-28 .  
17 The autopsy report concluded that the cause of Ms. Hill's death was "acute bacterial peritonitis  
18 due to ruptured duodenal-liver adhesions with perforation of duodenum." *Id.*, pg. 27. Manner  
19 of death was ruled "natural." *Id.*

20 The Jail has a video monitoring system that records the video and preserves the footage  
21 for 60 days. Dkt. 29-18, pg. 6-7. The recorded footage is written over beginning on day 61. *Id.*,  
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26 <sup>1</sup> This is a paraphrasing of the Court's statement of issues.

pg. 8. Typically, the portion of video preserved following the death of an inmate at the Jail is based on the request of the investigating detectives. *Id.*, pg. 9. Video footage can also be preserved based on a request from a Jail Sergeant or Lieutenant. *Id.*

Plaintiffs' counsel submitted a request for production in this case on or about December 14<sup>th</sup>, 2020. Dkt. 33, pp. 1-2. Request for Production 8, therein, requested "all video footage showing Cindy Lou Hill or showing the outside of any cells in which she was confined." *Id.* The County responded that "[e]fforts are being made to locate" the requested footage. *Id.* As of March 23, 2021, counsel for the Estate of Ms. Hill was notified that all available footage had been provided in response to RFP 8. *Id.* There is no allegation that the video that was the subject of plaintiffs' motion was destroyed after it was either requested or after there was express notice of litigation.

At issue in plaintiffs' underlying motion for default is video showing the hallway outside cell 2W27 on August 25, 2018 from 9:15 a.m. to 4 p.m. Dkt. 28, pg. 12. There are two cameras in the Jail that show different portions of 2 West. Dkt. 41, exhibits. 2 and 3. There is a camera closer to cell 2W27, for which footage was produced showing Ms. Hill being moved into her cell the morning of August 25, 2018 and the same camera view showing the time period from 4 p.m. to 6:30 p.m. the same day. Dkt. 29, pg. 5. There is a second camera, further from cell 2W27, but which also shows the hallway outside the cell, but from further away. Dkt. 42, ex. 2. Footage from this camera was preserved for August 25, 2018 from 9:09 a.m. to 4:35 p.m.. *Id.* Plaintiffs received this 7 hour and 26 minute video in March, 2021. Dkt. 34, pg. 4.

The Court has heard argument and been shown video from second camera and can draw its own conclusions about what those videos depict. Plaintiffs' motion for default judgment is premised, in part, on the notion that there is "no" video capturing the events of August 25,

1 2018 in the hallway outside cell 2w27. Plaintiffs' motion also implied that Nurse Gubitz  
 2 fabricated a visit to Ms. Hill's cell at approximately 3 p.m. on August 25<sup>th</sup>, while accompanied  
 3 by Corrections Officer Brett Janke and NaphCare Certified Nursing Assistant Justin Rogers.  
 4 Dckt 28, 10, line 15-20. They claimed that the missing video might have proven this lie. *Id.*

5 Video from the second camera, however, shows Nurse Gubitz, Officer Janke and CNA  
 6 Rogers conducting visits to the cells along 2W, including moving down the hallway to the area  
 7 outside cell 2W27 at the time Ms. Gubitz claimed the visit to Ms. Hill's cell occurred in a  
 8 contemporaneous report to law enforcement. Dkt. 41, ex. 2 (beginning at mark 5:30:30). This  
 9 video footage also shows cell checks being conducted down the row of cells that include 2W27  
 10 that correlate to the written cell watch form posted outside 2W27 with entries made by hand by  
 11 the corrections officers shown conducting the checks in the video. *Id.*; Dkt. 38, pg. 21. The  
 12 video from the second camera may be of lesser quality, because it is from a camera farther from  
 13 2w27, however, it belies the notion that there is "no video" from the area of the Jail where Ms.  
 14 Hill was housed. It also supports Nurse Gubitz's account of visiting Ms. Hill's cell the  
 15 afternoon of August 25, 2018.

16 Spokane County separately moved for summary judgment on plaintiffs' claims. Dkt. 37.  
 17 Plaintiffs opposition to summary judgment does not rely on any video, or absence of video, in  
 18 support of their arguments in response. Dkt. 43. Specifically, plaintiffs do not argue that their  
 19 causes of action against Spokane County are impaired due to the absence of any video. Their  
 20 claims against Spokane County are based on policy and practice only, not the specific actions  
 21 that allegedly occurred on August 25, 2018. *Id.* No other party has moved for summary  
 22 judgment.

### III. LAW AND ARGUMENT

#### A. A Court May Simultaneously Consider a Request for Terminating Sanctions for Spoliation and a Summary Judgment Motion brought by the Party Charged with Spoliation.

The Court raised the issue of whether it can enter a default judgment on liability as a spoliation sanction against an entity who may be able to establish that it is not liable on the merits via a pending summary judgment.

Counsel for Spokane County could find no case *prohibiting* a court from entering default judgment as a spoliation sanction against a party while a summary judgment motion on liability was pending on behalf of that party. The cases suggest that the motions can be considered independently of each other, in whatever order or manner the court determines appropriate.

In *Belew-Nyquist v. Quincy School District No. 144*, No. 2:19-CV-0215-TOR, 2020 WL 6845934, 1 (E.D. Wash. 2020), the Court considered a spoliation motion from the plaintiff seeking terminating sanctions while there was a pending summary judgment motion filed by the defendant. The Court considered each of the two motions separately, on their respective merits. It granted the defendants motion for summary judgment and denied the spoliation motion without indicating that one motion precluded consideration of the other. *Id.*, at 6-12.

In *MacNeil Automotive Products Limited v. Jinrong Automotive Accessory Development Co., LTD.*, C20-856 TSZ, 2021 WL 3674793 (W.D. Wash. 2021), the Court explained that “[b]oth sides seek judgment (Jinrong moves for summary judgment, while MacNeil requests default judgment as a sanction) . . .” *Id.* at 3. Like *Belew-Nyquist*, the court considered each motion separately and ruled on each motion based on the merits of that motion standing alone: denying terminating sanctions and denying summary judgment. *Id.* at

6-9. Other cases follow a similar process of separately considering the two motions. *See, e.g., Nursing Home Pension Fund, v. Oracle Corporation*, 254 F.R.D. 559 (N.D. Cal. 2008); *Peschel v. City of Missoula*, 664 F.Supp.2d 1137 (D. Mon. 2009); and *Surowic v. Capital Title Agency, Inc.*, 790 F.Supp.2d 997 (D. Ariz. 2011).

In sum, there does not appear to be an impediment to the Court considering a motion for terminating sanctions against a party who has filed a summary judgment motion. However, where, as here, the evidence that was allegedly spoliated is not *material* to plaintiffs' claims against Spokane County, the summary judgment motion should be given its due consideration.

At the prior hearing on Plaintiff's motion, counsel referenced another case from this District, *Moreno v. Correctional Health Care Companies, et al.*, 4:18-cv-5171-RMP, (E.D. Wash. 2020) suggesting that Spokane County's summary judgment motion in this case should be considered moot in the face of its spoliation motion. *Moreno*, however, has a very different set of facts from the case at bar. In that case, the plaintiffs notified the defendants pre-lawsuit that they were planning to file a lawsuit and asked them to preserve categories of records, including e-mails. *Id.*, pg. 5. After filing suit, plaintiffs served discovery requests on defendants for, among other things, e-mails on certain topics relevant to their civil rights theory of liability (i.e. policy and practices). *Id.*

The *Moreno* defendants did not produce full discovery responses and plaintiffs filed multiple motions to compel. *Id.*, pg. 6. The Court issued Orders to compel discovery responses, including a finding of contempt with one of those Orders. *Id.*, pg. 7. While a third motion to compel was pending, the parties stipulated that defendants admittedly "purged emails and that they had deleted the email accounts of relevant former employees *after*

1 receiving Plaintiffs' discovery requests. . . . Defendants conceded that 'the purge occurred *after*  
 2 a request for preservation of documents was sent . . . , *after* this lawsuit was filed and served,  
 3 and *after* discovery requests were served on Defendants by Plaintiffs." *Id.* (emphasis added)  
 4 Finally, defendants 30(b)(6) witness admitted that one purpose of the purge was to "avoid  
 5 'discovery risks'" i.e., "bad e-mails." *Id.*, pg. 11.

6  
 7 While the plaintiffs' motion for terminating sanctions for the admitted, intentional and  
 8 calculated spoliation was pending, defendants moved for summary judgment on the *Monell*  
 9 policy and practice claims. The Court agreed that the destroyed "emails would have been a key  
 10 source of information for Plaintiffs' *Monell* claims against Defendants." *Id.*, pg. 22. Against  
 11 this extreme set of facts, the Court concluded that a default judgment was warranted as a  
 12 sanction for the spoliation.<sup>2</sup> Once that decision was made, the Court denied the summary  
 13 judgment motion as moot. *Id.*, pg. 26.

14  
 15 The present case shares virtually nothing in common with *Moreno*. There was no  
 16 express prelawsuit notice to Spokane county, and there is no claim that the subject video  
 17 existed, if at all, more than sixty days after Ms. Hill's death – long before actual litigation  
 18 began. Nothing was destroyed *after* it was requested pre-lawsuit or after, and there have been  
 19 zero motions to compel against Spokane County in this case. Finally, video, or absence of  
 20 video has not been raised as a "key" part of plaintiffs' *Monell* claim against Spokane County.  
 21 The absence of video was not even argued as a basis to deny Spokane County's summary  
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23  
 24  
 25 <sup>2</sup> When faced with "extraordinary" and "extreme" circumstances showing "a pattern of disregard for Court orders  
 26 and deceptive litigation tactics that threaten to interfere with the rightful decision of a case" terminating sanctions may be  
 warranted. *In re Napster, Inc. Copyright Litigation*, 462 F.Supp.2d 1060, 1071 (N.D. Cal. 2006).



1 judgment motion. *Moreno* is an extreme example of deliberate spoliation *after* the material  
 2 had been requested in discovery and should not be considered a model for this case.

3 There does not appear to be any authority precluding this case from considering  
 4 plaintiffs' motion for spoliation when a summary judgment motion is pending. That being  
 5 said, as previously argued to the Court, the facts in this case do not support the extreme  
 6 sanction of default judgment against Spokane County. If the Court rules that default judgment  
 7 is not warranted as a sanction, then it can and should also consider Spokane County's  
 8 summary judgment motion on the merits.  
 9

10 **B. The Court Can Consider the Impact on NaphCare of Any**  
 11 **Sanction Imposed Against Spokane County.**

12 As this Court noted at the hearing on plaintiffs' spoliation motion, if the Court finds  
 13 there was spoliation of evidence, it should consider whether a lesser sanction than default  
 14 judgment is likely to be effective. *See, e.g., In re Napster, Inc. Copyright Litigation, supra,*  
 15 *462 F.Supp.2d at 1070:*

16 When considering a default sanction in response to spoliation of evidence, the  
 17 court must determine "(1) the existence of certain extraordinary circumstances,  
 18 (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the  
 19 efficacy of lesser sanctions, [and] (4) the relationship or nexus between the  
 20 misconduct drawing the [default] sanction and the matters in controversy in the  
 21 case."

22 *Quoting, Halaco Eng'g Co. v. Costle, 843 F.2d 376, 380 (9th Cir.1988).*

23 Moreover, "[d]ismissal [for spoliation] under a court's inherent powers is justified in  
 24 extreme circumstances." *In re Napster, Inc.*, at 1071. In the Ninth Circuit, "extraordinary  
 25 circumstances exist where there is a pattern of disregard for Court orders and deceptive  
 26 litigation tactics that threaten to interfere with the rightful decision of a case." *Id.*



1 In this case, as previously argued, if the Court finds spoliation, then the Court should  
 2 not enter a default because there is no evidence of “bad-faith” by Spokane County or other  
 3 extreme circumstances, such as in *Moreno, supra*. See, also *Leon v. IDX Systems Corp.*, 464  
 4 F.3d 951, 959 (9<sup>th</sup> Cir. 2006) ((noting that the plaintiff’s “deletion and ‘wiping’ of 2,200 files,  
 5 acts that were indisputably intentional, amounted to willful spoliation of relevant evidence”);  
 6 *Pettit v. Smith*, 45 F.Supp.3d 1099, 1110 (D.Ariz. 2018) (“dismissal of claims or a directed  
 7 verdict [for spoliation] without a finding of culpability approaching bad faith” is unsupported  
 8 by 9<sup>th</sup> Circuit authority.)

10 If the Court considers a lesser sanction, given the fact intensive nature of the Court’s  
 11 determination and its broad discretion, the County could find no case that would prevent the  
 12 Court from seeking to avoid or limit any negative impact of a sanction on NaphCare and Nurse  
 13 Gubitz. That is because there is no claim that NaphCare or Nurse Gubitz failed to preserve the  
 14 video in question. See, e.g. *Pettit v. Smith*, 45 F.Supp.3d 1099, 1110 (D.Ariz. 2018) (“the Court  
 15 has had difficulty finding any authority squarely considering whether spoliation of evidence  
 16 may be imputed to a defendant who did not participate in the spoliation.”)

18 Lesser sanctions may include a monetary sanction, exclusion of evidence or an adverse  
 19 inference instruction.<sup>3</sup> *In re Napster, Inc., supra*, at 1077-78. The determination of the  
 20 appropriate sanction is necessarily fact specific. For example, the Court can award the  
 21 reasonable fees associated with the spoliation motion. That would punish Spokane County and  
 22 avoid impacting NaphCare and Nurse Gubitz.

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25 <sup>3</sup> Plaintiffs have not sought the exclusion of other evidence, and there is no logical reason to limit  
 26 admission of other video that was timely produced to plaintiffs.

1 The Court may consider an adverse inference instruction. “[A] party seeking an adverse  
 2 inference instruction based on the destruction of evidence must establish (1) that the party  
 3 having control over the evidence had an obligation to preserve it at the time it was destroyed;  
 4 (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed  
 5 evidence was relevant to the party's claim or defense such that a reasonable trier of fact could  
 6 find that it would support that claim or defense.” *In re Napster, Inc., supra*, 462 F.Supp.2d at  
 7 1078.  
 8

9 Plaintiffs have not established that non-preserved video is relevant to their claims  
 10 against Spokane County, which is a pattern or practice claim challenging the “medical watch”  
 11 policy. It does not rely on the specific actions of corrections officers on August 25, 2018,  
 12 indeed an isolated incident by employees would not support a policy or practice claim.  
 13 Likewise, plaintiffs claims against NaphCare do not appear to be impacted by not having the  
 14 entire video from the camera in the hallway outside Ms. Hill’s cell. Their only argument is that  
 15 they cannot now prove Nurse Gubitz lied about her visit to Ms. Hill on the afternoon of August  
 16 25. However, plaintiffs did not mention in its opening motion that there was video from a  
 17 second camera that was preserved and produced, and which corroborated Nurse Gubitz’s  
 18 statement to law enforcement and deposition testimony. Plaintiffs’ sole argument in favor of a  
 19 default judgment fails to hold up considering the video from the second camera. Thus, it does  
 20 not appear that an adverse inference instruction is warranted.  
 21  
 22

23 However, if the Court does decide to instruct the jury on the issue of the video, it can  
 24 instruct the jury that Spokane County and not NaphCare or Nurse Gubitz had control over the  
 25 video recording system and if it instructs the jury to draw any adverse inferences, it can also  
 26

1 instruct them that those adverse inferences should not be drawn against NaphCare or Nurse  
 2 Gubitz. Juries are presumed to follow the Court's instructions.

3 In sum, the facts do not demonstrate extreme circumstances, such as a "pattern of  
 4 disregard for Court orders and deceptive litigation tactics that threaten to interfere with the  
 5 rightful decision of a case." Moreover, there is some video from the date and time plaintiffs'  
 6 reference in their motion, showing the area where Ms. Hill was celled, albeit from a different  
 7 camera further from Ms. Hill's cell. Sanctions, if any, should therefore be tailored to the harm  
 8 and not the drastic one sought by plaintiffs. If the Court orders a sanction, it should also avoid  
 9 punishing NaphCare and Nurse Gubitz.  
 10

#### 11 IV. CONCLUSION

12 The Court is not prohibited from considering plaintiffs' spoliation motion at the same  
 13 time it considers Spokane County's motion for summary judgment. However, terminating  
 14 sanctions are not warranted under the facts. If the Court concludes that any sanction is  
 15 required, the sanction should not punish NaphCare and Nurse Gubitz.  
 16

17 DATED this 4<sup>th</sup> day of March, 2022.

18 LAW, LYMAN, DANIEL,  
 19 KAMERRER & BOGDANOVICH, P.S.

20 /s/ John E. Justice

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**CERTIFICATE OF FILING & SERVICE**

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which constitutes service on the following under L.Civ.R. 5(b):

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DATED this 4<sup>th</sup> day of March, 2022, at Tumwater, WA.

*/s/ Tam Truong*

Tam Truong  
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